Supreme Court, U.S.
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In The

Supreme Court of the United States

Thomas Saporito, Petitioner

v.

U.S. Department of Labor, et al.

On Petition For Writ Of Certiorari
To The Circuit Court of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the court of appeals erred in its July 21st, 2005, Order, denying Petitioner's motion for reconsideration of its June 2, 2005 Order including its ruling in No. 98-5631; and

(2) Whether the court of appeals erred in its June 2nd, 2005, Order, granting Intervenor's motion to dismiss Petitioner's appeal on res judicata grounds despite Petitioners incorporation seeking review of the court of appeals' ruling in No. 98-5631; and

(3) Whether the court of appeals erred in its August 3rd, 1999, Order in No. 98-5631, denying Petitioner's petition for review of the final decision and order of the United States Secretary of Labor and its refusal to reconsider its decision.

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In the Supreme Court of the United States

THOMAS SAPORITO, PETITIONER

v.

U.S. DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner *pro se,* Thomas Saporito, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

JURISDICTION

The opinion of the court of appeals was entered lastly on July 21st, 2005. The petition for a writ of certiorari was filed on October 17th, 2005. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 210(a) of the Energy Reorganization Act of 1974 ("ERA"), added by Act of Nov. 6th, 1978, Pub. L. No. 95-601, 10, 92 Stat. 2951 (codified at 42 U.S.C. 5851(a)(1988)), provides that:

(a) No employer, including a [Nuclear Regulatory] Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or other wise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) --

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this [Act] or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this [Act] or the Atomic Energy Act of 1954, as amended;

(2) testified or is about to testify in any such proceeding or;

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this [Act] or the Atomic Energy Act of 1954, as amended.[1]

STATEMENT

1. Section 210 of the Energy Reorganization Act or 1974 ("ERA") prohibits employers from discharging or otherwise discriminating against nuclear industry

[1] Section 210 was amended and renumbered Section 211, energy Policy Act of 1992, Pub. L. No. 102-486, 2902, 106 Stat. 3123 (codified at 42 U.S.C. 5851). Section 210 applies to this case because the complaints were filed in 1988.

whistleblowers, *i.e.*, employees who engage in specified forms of protected conduct relating to the advancement of nuclear safety. 42 U.S.C 5851(a)(1)(A)-(B). It thus "encourages employees to report safety violations and provides a mechanism for protecting them against retaliation for doing so." *English v. General Elec. Co.*, 496 U.S. 72, 82 (1990).

Although most nuclear safety responsibilities are assigned by law to the Nuclear Regulatory Commission, "enforcement and implementation of [Section] 210 was entrusted by Congress * * * to the Department of Labor." *English*, 496 U.S. at 83 n.6. An employee who believes that he has been illegally discharged or otherwise discriminated against may file a complaint with the Secretary of Labor. 42 U.S.C. 5851(b)(1)(1988). The Department of Labor must investigate the allegation and notify the complainant and respondent of its initial determination as to whether a violation has occurred. 42 U.S.C 5851(b)(2)(A)(1988). A party dissatisfied with that determination may request a hearing before an administrative law judge ("ALJ"). 42 U.S.C. 5851(b)(2)(A)(1988). After the hearing, an ALJ issues a recommended decision and forwards it with the record to the Secretary, who issues a final order. 29 C.F.R. 24.6(a) and (b) (1997).[2] Any person adversely affected or aggrieved by the Secretary's final order may obtain judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, in the court of appeals for the circuit in which the violation allegedly occurred. 42 U.S.C. 5851(c)(1)(1988).

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[2] The Department of Labor's Administrative Review Board ("ARB") was delegated authority to make final agency decisions for the Secretary pursuant to 29 C.F.R. 24.7 and 24.8; 61 Fed. Reg. 19,978 (1996), superseded by 67 Fed. Reg. 64,272 (2000).

2. In the fall of 1988, Florida Power & Light Company ("FPL"), a NRC licensee, fired petitioner after FPL had gained full knowledge that petitioner had communicated nuclear safety concerns to the NRC about operations at FPL's Turkey Point nuclear station which resulted in the NRC's Office of Investigation ("OI") to conduct an investigation of FPL for alleged "wrongdoing" brought by petitioner.

3. Petitioner filed two complaints[3] with the Department of Labor, alleging that FPL violated Section 210 of the ERA by retaliating against him and by ultimately firing him from his job at the Turkey Point nuclear station as an instrument and control technician. The Department's Wage and Hour Division investigated the complaints and concluded that FPL violated the ERA when it ultimately fired petitioner. After a hearing, the ALJ issued a recommended decision holding that petitioner had not engaged in protected activity with respect to the first complaint and that FPL did not violate the ERA in firing petitioner with respect to the second complaint.

On June 3, 1994, the Secretary issued a Decision and Remand Order agreeing with the ALJ with respect to the first complaint, but rejecting the ALJ's findings with respect to the second complaint in which the Secretary specifically found that FPL violated the ERA when it fired petitioner for refusing to divulge his safety concerns to FPL's site vice president John Odom. The June 3 decision stated that "[a]n employee who refuses to reveal his safety concerns to management and asserts his right to bypass the 'chain of command' to speak directly with the Nuclear Regulatory Commission is protected under [the ERA]." Decision and Remand Order (D. & R.O.) at 1. It also held that "[c]overed employers who

[3] The cases were docketed as 89-ERA-07 and 89-ERA-17 and consolidated by the ALJ at the first hearing.

discipline or discharge an employee for such [protected] conduct have violated the ERA," D. & R.O. at 1, and that "FP&L violated the ERA when it discharged Saporito for refusing to obey [management's] order to reveal his safety concerns." D. & R.O. at 6. After the conclusion of the second hearing, a different ALJ issued a Recommended Decision in favor of FPL. The ARB upheld the ALJ's Recommended Decision over petitioner's appeal.

4. The court of appeals denied petitioner's petition for review on August 3rd, 1999 holding that "The complaints in this case presented fact-intensive issues and substantial evidence in the record supports the findings that resulted in the dismissal of these complaints. We also conclude that Saporito has failed to demonstrate that proper legal standards were not applied." Order at 2.

5. On December 17th, 2004, following petitioner's petition for a new trial and his motion for reconsideration, the ARB issued a Final Decision and Order denying petitioner's motions.

6. On June 2nd, 2005, the court of appeals issued an Order granting Intervenor's FPL motion to dismiss on res judicata grounds.

7. On July 21st, 2005, the court of appeals issued an Order Denying petitioner's motion for reconsideration of the Court's June 2nd, 2005 decision.[4]

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[4] Petitioner's petition for review by the court of appeals also incorporated a request that the Court reconsider its earlier decision made in this case and docketed as No. 98-5631, an unpublished decision. The court of appeals summarily denied all the issues raised by the *pro se* petitioner in its July 21, 2005 Decision docketed as No. 05-10449-DD.

REASONS FOR GRANTING THE PETITION

The court of appeals' refusal to reconsider its own decision in case No. 98-5631; and the court of appeals' granting of Intervenor's motion to dismiss on res judicata grounds conflicts with well-settled law which permits a court to reconsider its prior decisions.

1. This Court's review is warranted because the court of appeals improperly failed to reconsider its own decision in case No. 98-5631; and further, the court of appeals improperly applied the doctrine of *res judicata* in reaching its decision. First, the court of appeals has jurisdiction to review its own prior decisions under 11th Cir. R. 27-2. Here, the court of appeals is not subject to the doctrine of *res judicata* as it is free to reconsider its own decisions which have not been previously "touched" by this Court. Yet, the court of appeals, without comment, simply rejected *pro se* petitioner's motion for reconsideration of the court of appeals' decision in case No. 98-5631 and relied on the doctrine of *res judicata* in its judgment.

2. The court of appeals erred in failing to conduct a *de novo* review of the complaints raised in case No. 98-5631. Notably, the court of appeals held that:

> "The complaints in this case presented fact-intensive issues and substantial evidence in the record supports the findings that resulted in the dismissal of these complaint. We also conclude that Saporito has failed to demonstrate that proper legal standards were not applied."

Id. at 2.

However, on matters of law, the court of appeals is required to review *de novo* but also pay deference to the Secretary in construing the statutes he is charged with administering. *See Chevron U.S., 4., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S.

837, 104 S. Ct. 2778 (1984); *Bechtel Construction Co. v. Sec'y of Labor,* 50 F.3d 926, 931, 933 (11th Cir. 1995). Moreover, on matters of fact, the court of appeals reviews the Secretary's order for substantial evidence to support the decision. 5 U.S.C. 706(2)(E). The court of appeals must ask whether such relevant evidence exists "as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales,* 402 U.S. 389, 401, 91 S. Ct. 1420, 1427 (1971) (*quoting Consolidated Edision Co. v. NLRB,* 305 U.S. 197, 229, 59 S. Ct. 206, 217 (1938). The court of appeals does not reweigh the evidence or substitute its judgment for that of the Secretary, but reviews the entire record to determine if the decision reached is reasonable and supported by substantial evidence. *Cornelius v. Sullivan,* 936 F.2d 1143, 1145 (11th Cir. 1991). Where the ALJ and the Secretary of Labor differ, as here, we have observed that , "[t]his disagreement causes us to review the Secretary's order more critically. Ultimately, however, the decision is the Secretary's. We ensure only that the Secretary's conclusion, if different from the ALJ's, is supported by articulate, cogent, and reliable analysis." *Stone & Webster Eng'g Corp. v. Herman,* 115 F.3d 1568, 1572 (11th Cir. 1997).

Here, in the instant action, the court of appeals failed to conduct a proper and *de novo* review of the Secretary's decision in Case Nos. 89-ERA-7 and 89-ERA-17 in determining if the decision reached was reasonable and supported by substantial evidence and by articulate, cogent, and reliable analysis.[5] The court

[5] The court of appeals erred by relying on an inaccurate record in reaching their decision in case No. 98-5631. Notably, the ALJ made a significant error at the first hearing by failing to create a true and accurate record of the proceeding over which he presided in accordance with 29 C.F.R. 18.59. The ALJ then complicated his error by allowing FPL to substitute portions of

of appeals relied on a "tainted" record transcript in reaching its decision in this case. The record shows that on May 4th, 1988, Saporito complained to two FPL supervisors, Harley and Tomaszewski, about problems with safety related clearance procedures on a highly visible work order. [T.735-45][1989 record]. Saporito's safety concerns surfaced while the Institute for Nuclear Power Operations ("INPO") was conducting an on-site evaluation at the Turkey Point nuclear plant, and, significantly, INPO investigators observed the very job about which Saporito raised safety concerns. [June 30, R.D.&O. at 6]. Saporito escalated his safety concerns through a letter to INPO on May 19th, 1988 and copied the same to FPL management. [RX-51]. In his letter to INPO Saporito questioned whether Harley was properly trained to perform certain safety related clearance procedures. Within days of Saporito's letter to INPO, which questioned the competence of FPL supervisors to carry out safety related responsibilities, Harley recommended that Saporito be disciplined. [T.1829-30][1989 record]. The timing of FPL's disciplinary actions in May of 1988 could not be more obvious. On May 11th, 1988, Saporito received the first in a series of retaliatory disciplinary actions by FPL. Saporito's co-workers perceived that Harley was trying to get Saporito fired. One employee felt that Harley was out to get rid of Saporito. [T.2160][[1988 record]. Another employee testified that Harley made comments that he was out "to get" Saporito and that was common knowledge: [T.552][1988 record]. In fact, Harley even agreed that employees in the shop "probably interpreted it that way." [T.1863-64][1988

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their own "privately" recorded hearing transcripts into the official Department's record transcripts. Thus, the court of appeals failed to conduct a proper *de novo* review of the record as it was required to do in reaching its decision.

record]. Harley conceded that he considered Saporito to be "an irritant." [T.1864[1988 record]. Notably, it was not just a perception that Harley was trying to get Saporito fired after he reported safety concerns in May 1988. Harley did request FPL management to fire Saporito in late May or early June 1988. Odom the FPL vice president, confirmed that in early June 1988, at the urging of Harley's manager, Kappes, the FPL Industrial Relations ("IR") department reviewed Saporito's personnel record to determine whether Saporito could be discharged. [T.1513-14][1988 record]. Significantly, the IR department concluded in June 1988, that there was insufficient reason to terminate Saporito's employment. *Id.*

Odom's testimony on this issue corroborates that Harley was out to get Saporito fired shortly following Saporito's protected activity in May 1988. If further supports that the retaliatory actions taken against Saporito in May and June 1988, had a "chilling effect" on Saporito's co-workers who correctly believed that Harley was trying to get Saporito fired. In an even more disturbing incident following Saporito's May 1988, protected activity, Harley gave Saporito a hazardous job assignment that required Saporito to enter the containment vessel of the nuclear plant (a high radiation area) with protective gear and a respirator. Due to high temperatures of approximately 113 degrees Fahrenheit, and a lack of air in the respirator, Saporito became fatigued and , consequently, went home sick. After Saporito went home sick from extreme heat exposure, Harley boasted to other workers about causing Saporito's illness, by stating, "I got him, I got him, I sent him home sick." [T.2159][1988 record]. Notably, Harley admitted that right after Saporito became ill he commented that "Maybe he [Saporito] should have died." [T.1863][1988 record] (emphasis added). In

other words, Harley wished Saporito had died when he experienced health problems in the containment vessel.

FPL subjected Saporito to further discrimination after he made complaints to the NRC and to the DOL in the fall of 1988, actions which themselves constituted protected activity.[6] One harassment incident involved threatening behavior by Koran, an FPL supervisor, after Saporito engaged in protected activity. In another incident, Boger, FPL's radiological training instructor, shouted obscenities at Saporito after he asked Boger questions about topics covered in questions on a safety training exam taken by Saporito. [T.1651-52][1988 record]. The Boger incident, in particular, establishes a prima facie case because Saporito's questions to Boger were protected activity. Notably, the adverse action Saporito received in November and December 1988, including his termination in December 1988, occurred immediately after he engaged in additional protected activity. Saporito was in contact with the NRC between September and December of 1988, and he filed complaints under the ERA with the DOL in October and November 1988. FPL learned these facts, which were common knowledge at Turkey Point, directly from the NRC during these months. Odom's questioning of Saporito on November 23rd, 1988; FPL's placing of Saporito to restricted status; demeaning job assignments [T.812-13; T.1760][1988 record], and Odom's attempted interrogation of Saporito on November 30, 1988; related directly to

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[6] On September 29, 1988, Saporito sent a letter to the NRC documenting his safety concerns and alleging that he was being harassed for reporting safety concerns. By letters dated October 14, 1988, October 31, 1988, and November 8, 1988, Saporito filed complaints with the Department of Labor ("DOL") pursuant to Section 210 of the ERA, alleging retaliation.

Saporito's protected activity and shortly followed Saporito's contacts with the NRC as well as his filing of ERA complaints with the DOL. In addition, FPL's order that Saporito see a company doctor on December 16th, 1988, and the subsequent discharge of Saporito on December 22nd, 1988, each closely followed Saporito's protected activity.[7]

Clearly, the court of appeals failed to conduct a proper *de novo* review of this case in reaching its decision in case No. 98-5631, where the Secretary failed to find that Saporito made out a prima facie case in Case No. 89-ERA-07. Moreover, the court of appeals failed to conduct a proper *de novo* review of this case in reaching its decision in case No. 98-5631, were the record does not support the Secretary's decision in the consolidated cases incorporating Saporito termination. The record evidence proffered by Saporito must raise an inference that the protected activity was the likely motive for the adverse action. Saporito met his burden by showing the proximity in timing of the adverse action to the protected activity. Moreover, a careful reading of the ARB's decision in ARB No. 98-008 clearly shows that the ARB failed to apply controlling law in reaching their decision.

The Secretary held that,

> ". . . Saporito's refusal to obey Odom's direct order to divulge his safety concerns on November 23, 1988, was-"protected activity" and that FP&L violated the ERA when it later discharged Saporito." "I need not decide whether it is appropriate under the ERA to balance Respondent's interests in immediate

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[7] Collectively, all of the harassment incidents and adverse action that occurred between May and December 1988, satisfy a prima facie case of "hostile work environment." *See, Mitchell v. APS/ANPP,* ALJ Case No. 91-ERA-9, slip op. of ALJ at 36-37 (July 2, 1992).

discovery of potential threats to public health and safety against complainant's right to protection for reporting his safety concerns outside the chain of command because I find FP&L's rational for requiring Saporito to reveal his safety concerns to the Site Vice President disingenuous.[8] Saporito told Odom on November 23, 1988, when Odom gave him a 'direct order' to tell Odom his nuclear safety concerns, T.1438I, that Saporito 'would only talk to the NRC.' T.1438H. Odom then ordered Saporito to tell the NRC his nuclear safety concerns 'at his first available opportunity' and Saporito said he would. T.1438J; 907. At that point, FP&L knew that the NRC, the government agency responsible for nuclear safety, would be notified and it was reasonable to assume the NRC would notify FP&L immediately if there were an imminent threat to public health or safety. I find that FP&L violated the ERA when it later discharged Saporito, among other reasons, for refusing to obey Odom's order to reveal his safety concerns. As grounds for dismissal, FP&L also cited Saporito's refusal to stay after his regular work day on November 30, 1988 to attend a meeting at which Odom again wanted to ask Saporito about his safety concerns, R-104; T.1445-46; 2024, and

[8] During the remand hearing in 1997, Odom had no reasonable explanation for whiting-out his personal calendar "only" for the day of November 20th, 1988, the very day that Odom called the NRC by telephone and spoke with Oscar DeMiranda and with George Jenkins about Saporito. The NRC advised Odom that Saporito had not raised any "immediate" safety concerns regarding operations at Turkey Point, and that the agency would certainly contact him [Odom] or FPL immediately, if such concerns were later learned.

> Saporito's refusal to be examined by a company doctor. Odom's decision to require Saporito to be examined by a company doctor grew out of the excuse Saporito gave on November 30 for refusing to stay late for the meeting with Odom,[9] that Saporito was ill, and Saporito's reason for taking 12 days sick leave[10] after November 30, that Saporito was suffering from stress related medical problems. T.1455. Each of these reasons for discharge is related, at least in part, to Saporito's refusal to reveal his safety concerns to FP&L, an act I have held protected under the ERA . . . "

See, Secy' Decision and Remand Order, (June 3, 1994 at 3-4.)

The ARB was fully aware of the Secretary's directive to the ALJ on remand, to review the record and submit a new recommended decision on whether FPL would have discharged Saporito for legitimate reasons even if he had not insisted on his right to reveal his safety concerns only to the NRC. *See, ARB No. 98-008, Final Decision and Order* (Aug. 11, 1998 at 1-2). The court of appeals failed to conduct a proper *de novo* review of the this case in considering whether the Secretary and later the ARB, should have found causation in Saporito's protected activity in contacting INPO to raise safety concerns about operations at Turkey Point in early 1988; and whether FPL's adverse actions in disciplining Saporito closely

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[9] At the remand hearing, Odom testified that he made the decision to fire Saporito prior to ordering Saporito to see the company doctor. Thus, all of FPL's reasons for discharging must be found to be pretexual and not true, and that the real reason for Saporito's discharge was his engagement in protected activity.

[10] At the remand hearing, Kappes admitted under oath that Saporito was paid for all the sick days that he had taken, and that FPL only paid for sick time when the sick time was taken for legitimate reasons.

followed that protected activity. *See,* ARB No. 98-001 at 6. This glaring and fundamental error calls into question the reliability of the entire decision by the circuit court of appeals in case No. 98-5631. Notably, the most common fact used to establish retaliatory motive is evidence of timing. *See, Newkirk v. Cypress Trucking Lines, Inc.* Case No. 88-STA-17, slip op. of SOL at 8 (Feb. 13, 1989)("Adverse action closely following protected activity is itself evidence of an illicit motive.") The fact that an employer takes disciplinary actions shortly after an employee engages in protected activity is, unto itself, "sufficient to raise an inference of causation" to establish that element of the prima facie case. *Id. See, also, Ertel v.Giroux Bros. Transp., Inc.* Case No. 88-STA-24, slip op. of SOL at 24-25 (Feb. 16, 1989); *Priest v. Baldwin Assoc.,* Case No. 84-ERA-30, slip op. of SOL at 10 (June 11, 1986). Significantly, the court of appeals' decision in case No. 98-5631 did not even address the ample record evidence of timing in Case No. 89-ERA-07, yet the court of appeals concluded that there was no discriminatory motive established. The record however, amply demonstrates that all the adverse action taken by FP&L against Saporito occurred shortly after he engaged in protected activity.

Odom's questioning of Saporito about his safety concerns on November 23rd, 1988; FP&L's placing Saporito on restricted status; demeaning job assignments [T.812-13, 1760], Odom's attempted interrogation of Saporito about his safety concerns on November 30th, 1988, and later FP&L's requiring Saporito to see the company doctor and Saporito's discharge, shortly followed Saporito's contacts with the NRC as well as his filing ERA complaints with the DOL. Thus, because the court of appeals failed to consider Petitioner's *prima facie* case in ALJ 89-ERA-07 in deciding whether FP&L was motivated by

Petitioner's protected activity in ALJ No 89-ERA-17, its opinion in case No, 98-5631 is unsupported by substantial evidence, and is therefore arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

3. The consolidated cases before this Court unquestionably present questions of dual motive. FP&L alleged it fired Saporito for three reasons: (1) for refusing to Obey Odom's order to reveal his safety concerns on November 23rd, 1988; (2) Saporito's refusal to stay late after his regular work day on November 30th, 1988, to attend a meeting at which Odom again wanted to ask Saporito about his safety concerns, R-104; [T.1445-46, 2024]; and (3) Saporito's refusal to be examined by a company doctor. Each of these reasons for discharge is related, at least in part, to Saporito's refusal to reveal his safety concerns to FP&L, an act the Secretary held to be protected under the ERA. *See, Sec'y Decision and Remand Order at 3-4,* (June 3rd, 1994). Here, all of FP&L's alleged reasons for discharging Saporito are inextricably intertwined with Saporito's protected activity and simply cannot be divorced from that protected activity. Thus, the court of appeals erred in not finding FP&L's rationale for discharging Saporito to be pretextual, and that the true reason and motivation for discharging Saporito was his engagement in protected activity.

4. In deciding No. 98-5631, the court of appeals failed to consider substantial record evidence which clearly shows that Odom, the FP&L Site Vice President over Turkey Point, lied under oath at hearing when Odom testified that [h]e required Saporito's attendance at a meeting on November 30th, 1988, to learn if there was any immediacy about any of Saporito's safety concerns that Saporito had communicated to the NRC about the Turkey Point

nuclear plant. The court of appeals also erred in failing to consider substantial record evidence which clearly shows that Odom's order that Saporito see a company doctor was pretextual insofar as Odom made the decision to discharge Saporito prior to requiring Saporito to see the company doctor, and that no matter what the outcome from Saporito's visit with the company doctor, Saporito was already discharged by Odom. Therefore, FP&L's alleged legitimate business reason for discharging Saporito because [h]e refused to be examined by the company doctor was pretextual and that the real reason for FP&L's discharging Saporito was his protected activity. To the extent that FP&L's ordering Saporito to be examined by a company doctor was a pretext, FP&L's requiring Saporito to attend a meeting with Odom on November 30th, 1988, to reveal his safety concerns, to learn if there existed any immediacy to those safety concerns was also a pretext and not true, and that the real reason for FP&L's discharging Saporito was his protected activity.[11]

5. The court of appeals also ignored substantial record evidence that clearly shows that FP&L's suspension and discipline of Saporito was not

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[11] Here again, on the morning of November 30th, 1988, Odom telephoned the NRC and learned that none of Saporito's safety concerns had any immediacy about them, and that the NRC would immediately contact Odom and FP&L should any such safety concerns come to light. Odom therefore lied under oath with respect to his testimony that he ordered Saporito to a meeting on November 30th, 1988 to learn if any of Saporito's safety concerns had any immediacy about them. Moreover, Odom whited-out the day of November 30th, 1988, in his calendar that he maintained at Turkey Point. No other days were whited-out by Odom. Clearly, Odom intended to mislead the NRC and intended to mislead the DOL in covering up his contact with the NRC on the morning of November 30th, 1988. Additionally, FP&L withheld Odom's calendar from Saporito during discovery at the 1989 hearing.

consistent with discipline (including discharge, suspension, and demotion) it had meted out to other employees under similar circumstances. Evidence contained in RX-111 supports the fact that FP&L treated Saporito more harshly than other employees accused of disobeying management orders. Kappes, a subordinate manager to Odom, conceded at trial that another employee who refused [h]is direct orders on numerous occasions (and more times than Saporito allegedly refused orders) was not fired [T.2058-63]. Unlike Saporito, this other employee was afforded a meeting with union stewards and management to discuss his repeated failures to comply with direct orders before discipline was imposed. *Id.* Significantly, this other employee was only suspended rather than fired like Saporito. Moreover, FP&L maintained a company policy requiring discipline of its employees, like Saporito, to be handled at the lowest level of management. In contrast, Saporito's immediate supervisor, Verhoeven, was not permitted any role in the disciplinary actions taken against Saporito. Rather, FP&L failed to utilize its progressive discipline policies in Saporito's case which provided for lesser penalties other than discharge. FP&L deviated from its own disciplinary policies and gave Saporito the harshest discipline when company policies called for less penalties. Notably, FP&L did not provide Saporito any rights to contest or to challenge his discipline pursuant to the union contract maintained between FP&L and the International Brotherhood of Electrical Workers which Saporito was a member.

The court of appeals erred in deciding No. 98-5631, in failing to properly review the ARB's decision in ARB No. 98-008, in which the ARB held that:

> ". . . Here Odom clearly had a valid purpose in wanting to question Saporito about his safety

concerns: to learn whether any of those concerns had immediate significance for public health and safety. . ."

Id. at 9.

In contrast, the Secretary held in his June 3rd, 1994, Decision and Remand Order that:

"I need not decide whether it is appropriate under the ERA to balance Respondent's interests in immediate discovery of potential threats to public health and safety against Complainant's right to protection for reporting his safety concerns outside the chain of command because I find FP&L's reason for requiring Saporito to reveal his safety concerns to the Site Vice President disingenuous. Saporito told Odom on November 23, 1988, when Odom gave him a 'direct order' to tell Odom his nuclear safety concerns, T.1438I, that Saporito 'would only talk to the NRC.' T.1438H. Odom then ordered Saporito to tell the NRC his nuclear safety concerns 'at the first available opportunity' and Saporito said he would. T.1438J; 907. At that point, FP&L knew that the NRC, the government agency responsible for nuclear safety, would be notified and it was reasonable to assume the NRC would notify FP&L immediately if there were an imminent threat to public health or safety. I find that FP&L violated the ERA when it later discharged Saporito, among other reasons, for refusing to obey Odom's order to reveal his safety concerns. . ."

Id. at 2-4.

As stated earlier, Odom telephoned the NRC on the morning of November 30th, 1988, and learned first hand that Saporito had not raised any nuclear safety

concerns that had any immediacy about them. In addition, the NRC assured Odom that the agency would immediately contact him or FP&L should they later learn of any such safety concerns. Clearly, the substantial record evidence shows that Odom lied under oath and attempted to cover-up his contacts with the NRC[12] by obliterating his calendar entries on the very day of November 30th, 1988. Despite this overwhelming substantial record evidence, the court of appeals ruled against Saporito in deciding case No. 98-5631. Notably, Odom conceded at the remand hearing that on November 30, 1988, he was told by Jenkins of the NRC that the agency was not aware of any immediate significant safety issues raised by Saporito, and that if there were concerns that the NRC thought he [Odom] needed to know, they would tell him. Odom believed in good faith that the NRC would tell him if there was an immediate nuclear

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[12] On the morning of November 30th, 1988, Odom placed a telephone call to NRC Region II seeking information about Saporito's nuclear safety concerns. The record shows that "Odom said his reason for calling was to report that . . .[Saporito] has not provided any safety concerns. . .Odom said that . . . Saporito said that the NRC has instructed. . .[Saporito] not to provide safety concerns to the licensee. . .Odom said 'has he given you people any safety concerns.' Jenkins responded that we do not divulge information that is exchanged between an individual and the NRC. Odom said that he understood." "Odom said he needed to know if . . . [Saporito] had provided any information of significant safety and Jenkins responded that we are currently unaware of any immediate significant safety issues. Odom said that if we were to at any time gain any information of an immediate safety significance to please notify him immediately as he said, 'I need to know that information.' Jenkins said that we would certainly cooperate if that were the case." *See, Attachment One,* at pages entitled "Memorandum for Case File" dated November 30, 1988, included with Petitioner's June 29, 2004, Answer to Respondent's Memorandum in Opposition to Complainant's Supplemental Motion for Reconsideration.

safety concern. [T.520-22]. Therefore, it was incumbent upon the circuit court of appeals to find, as did the Secretary, that:

> ". . . FP&L knew that the NRC, the government agency responsible for nuclear safety, would be notified and that it was reasonable to assume the NRC would notify FP&L immediately if there were an imminent threat to public health or safety. I find FP&L violated the ERA when it later discharged Saporito, among other reasons, for refusing to obey Odom's order to reveal his safety concerns. . ."

June 3, 1994, Decision and Remand Order at 3-4.

The court of appeals in deciding No. 98-5631, failed to properly apply a dual motive analysis to this case. Clearly, the ARB's decision is wholly unsupported by substantial record evidence, is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. *See, Price Waterhouse v. Hopkins,* 490 U.S. 228, 252, 109 S. Ct. 1775, 1791 (1989) where the court held that:

> ". . . The employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive. . . The legitimate reason must be both sufficient to warrant the employer's action and it must have motivated the employer at the time of the decision. . . It is not enough that the decision was motivated in part by the legitimate reason. The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision. . ."

Id.

Here, the substantial record evidence clearly shows that Odom did not have a valid purpose in wanting to question Saporito about his safety concerns on November 30th, 1988, because Odom learned from the NRC on that very morning, that none of Saporito's nuclear safety concerns had any immediacy about them. Despite this substantial and overwhelming record evidence, the court of appeals ruled against Saporito in No. 98-5631.

6. The court of appeals summarily dismissed petitioner's appeal for reconsideration of its decisions in case No. 05-10749-DD and No. 98-5631, and later rejected *pro se* petitioner's subsequent motion for reconsideration in No. 98-5631, stating that the court of appeals had dismissed that matter in deciding No. 05-10749-DD. Petitioner argues here that the court of appeals erred in summarily dismissing his petition for review of case No. 98-5631, in granting Intervenor's motion to dismiss on *res judicata* grounds. Significantly, the court of appeals' ruling in No. 98-5631, is not subject to the doctrine of *res judicata*, as the court of appeals is free to reconsider its own decisions as a matter of law. In *Rudd,* the court held that:

> . . . it was "not bound by the law of case' doctrine, which is discretionary and does not limit our power to reconsider our decision prior to final judgment if we determine that our earlier ruling was erroneous."

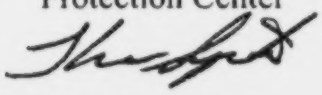
See, Ruud v. Westinghouse Hanford Co., ARB Nos. 99-023, 99-028, ALJ No. 1988-ERA-33, (ARB Apr. 18, 2002). Here, the court of appeals has inherent authority to reconsider its decision in case No. 98-5631, if it determines that its earlier ruling was erroneous. Additionally, the Federal Rules of Civil Procedure, Rule 60(b)(6) provides the court of appeals authority to reconsider its earlier ruling in No.

98-5631, and to relieve Saporito from a final judgment of the court of appeals.

CONCLUSION

For all the above stated reasons, this petition for writ of certiorari should be GRANTED. In the alternative, this Court should vacate the court of appeals' decision in this consolidated case and REMAND this case for a new hearing on the merits *de novo.*

Respectfully submitted,
National Environmental
Protection Center



Thomas Saporito
pro se petitioner
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North Palm Beach, FL 33408
Telephone: 561-202-8797

APPENDIX

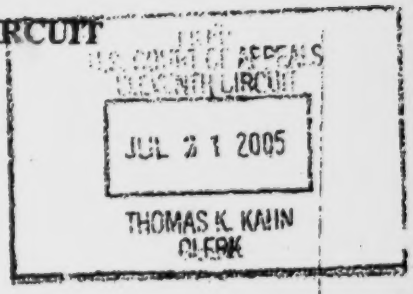
1. July 21, 2005, No. 05-10749-DD, Order of the Court of Appeals denying petitioner's motion for reconsideration of the court of appeal's June 2, 2005, Order. Before Circuit Judges: Carnes, Hull and Wilson.

2. June 2, 2005, No. 05-10749-DD, Order of the Court of Appeals granting intervenor's motion to dismiss appeal on res judicata grounds. Before Circuit Judges: Tjoflat, Dubina and Carnes.

3. August 3, 1999, No. 98-5631, Order of the Court of Appeals denying petitioner's petition for review. Before Circuit Judges: Cox, Black and Carnes.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT



No. 05-10749-DD

THOMAS SAPORITO,

Petitioner,

versus

U.S. DEPARTMENT OF LABOR,

Respondent,

FLORIDA POWER & LIGHT COMPANY,

Intervenor.

On Petition for Review from a Final Order
of the Administrative Review Board

BEFORE: CARNES, HULL and WILSON, Circuit Judges.

BY THE COURT:

Petitioner's motion for reconsideration of this Court's June 2, 2005, Order, is DENIED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUN 02 2005
THOMAS K. KAHN
CLERK

No. 05-10749-DD

THOMAS SAPORITO,

Petitioner,

versus

U.S. DEPARTMENT OF LABOR,

Respondent,

FLORIDA POWER & LIGHT COMPANY,

Intervenor.

On Petition for Review from a Final Order
of the Administrative Review Board

BEFORE: TJOFLAT, DUBINA and CARNES, Circuit Judges.

BY THE COURT:

Intervenor's motion to dismiss this appeal on res judicata grounds is GRANTED.

Appellee's motion to file its brief out of time is DENIED AS MOOT.

Appellant's motion to strike Intervenor's brief as untimely is DENIED AS MOOT.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPE
ELEVENTH CIRCUI
AUG 03 1999
THOMAS K. KAHN
CLERK

No. 98-5631
Non-Argument Calendar

Case Nos. 89-ERA-7, 89-ERA-17

THOMAS J. SAPORITO, JR.,

Petitioner,

versus

UNITED STATES DEPARTMENT OF LABOR,

Respondent,

FLORIDA POWER & LIGHT COMPANY,

Intervenor.

On Petition for Review of the Final Decision and Order of the United States Secretary of Labor

(August 3, 1999)

Before COX, BLACK, and CARNES, Circuit Judges.

PER CURIAM:

Thomas J. Saporito, Jr. petitions for review of the Secretary of Labor's dismissal of his complaints filed pursuant to the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851. Saporito argues that the Secretary's dismissal of Case Nos. 89-ERA-7 and 89-ERA-17 should be reversed because proper legal standards were not applied and the decisions are not supported by substantial evidence.[1]

This court's review is deferential. We may overturn the Secretary's decision only if the decision is "unsupported by substantial evidence" or if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), (E).

The complaints in this case presented fact-intensive issues and substantial evidence in the record supports the findings that resulted in the dismissal of these complaints. We also conclude that Saporito has failed to demonstrate that proper legal standards were not applied.

PETITION FOR REVIEW DENIED.[2]

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[1] The Secretary says that Saporito's petition seeking review is timely as to both cases; Florida Power & Light Company, intervener, takes the position that the petition is timely only in Case No. 89-ERA-17. The record reflects that the two cases remained consolidated throughout, and we conclude that the petition to review is timely as to both cases.

[2] The request for oral argument is denied.

Supreme Court, U.S.
FILED

05 - 717 OCT 17 2005

OFFICE OF THE CLERK

In The

Supreme Court of the United States

Thomas Saporito, Petitioner

v.

U.S. Department of Labor, et al.

On Petition For Writ Of Certiorari
To The Circuit Court of Appeals
For The Eleventh Circuit

SUPPLEMENTAL APPENDIX

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Nov. 30th, 2005

SUPPLEMENTAL APPENDIX

1. December 17, 2004, Final Decision and Order, Administrative Review Board. Before Administrative Appeals Judge Wayne C. Beyer and Chief Administrative Appeal Judge M. Cynthia Douglas.

2. August 11, 1998, Final Decision and Order, Administrative Review Board. Before Member, Paul Greenberg and Acting Member, Cynthia L. Attwood.

U.S. Department of Labor Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

THOMAS J. SAPORITO, JR., **ARB CASE NO. 04-079**

COMPLAINANT, **ALJ CASE NOS. 89-ERA-7**
89-ERA-17

v. **DATE: December 17, 2004**

FLORIDA POWER & LIGHT COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Thomas J. Saporito, Jr., pro se, *Boynton Beach, Florida*

For the Respondent:
Mitchell S. Ross, Esq., Ellen S. Malasky, Esq., *Florida Power & Light Company, Juno Beach, Florida*

James S. Bramnick, Esq., *Akerman Senterfitt, Miami, Florida*

FINAL DECISION AND ORDER

This matter arises under the whistleblower protection provision of the Energy Reorganization Act, 42 U.S.C.A. § 5851 (West 1989) (ERA) and implementing regulations, 29 C.F.R. Part 24

(1989).[1] Petitioner Thomas Saporito objects to a Final Decision and Order issued by the Board in 1998 and affirmed by the Eleventh Circuit Court of Appeals in 1999. *Saporito v. Florida Power & Light Co.*, ARB No. 98-008, ALJ Nos. 89-ERA-7, 89-ERA-17 (Aug. 11, 1998), *aff'd*, 199 F.3d 130 (11th Cir.1999) (unpublished table decision), *reh'g en banc denied*, 210 F.3d 395 (11th Cir. 2000). Saporito argues that the Board's 1998 decision contains errors of law and fact and is based in part on a defective hearing transcript. We conclude that the Eleventh Circuit decision bars consideration by us of Saporito's latest claims.

Section 5851 of the ERA protects employees in the nuclear power industry from adverse employment actions by employers wishing to discourage employees from speaking out about nuclear power hazards. Section 5851 achieves its protective goals by providing for agency investigations of employee complaints, agency adjudication of employee complaints, and judicial review of final agency decisions.

In 1989 Saporito filed an ERA whistleblower complaint against his employer, Florida Power & Light. After investigation by the Labor Department and two hearings on the record, Labor Department Administrative Law Judgers (ALJs) twice issued recommended decisions dismissing Saporito's complaint on the merits. Saporito exercised his right to appeal the ALJ decisions to the Secretary of Labor and subsequently, to this Board. The Board ultimately issued a final agency decision and order dismissing Saporito's complaint for lack of merit. Saporito invoked his right to judicial review and appealed the Board's final decision and order to the United States court of Appeals for the Eleventh Circuit. The

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[1] Congress amended § 5851 in 1992. Pub. L. No. 102-486, Title XXIX, §§ 2902(a) to (g), (h)(2), (3), 106 Stat. 3123, 3124 (1992). This case arose in 1989, and none of the 1992 amendments pertain to the issues before us. Accordingly, we refer to the 1989 versions of § 5851 and implementing regulations.

Eleventh Circuit summarily affirmed the Board decision and denied Saporito's request for rehearing en banc.

The Eleventh Circuit decision is the final adjudication on the merits of Saporito's 1989 complaint. That decision stands as a complete bar to further review of the merits of Saporito's complaint. "[T]he doctrine of *res judicata* provides that when a final judgment has been entered on the merits of a case, '[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privy with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.'" *Nevada v. United States*, 463 U.S. 110, 129-130, 103 S.Ct. 2906, 2918 (1983) (internal citation omitted).

Saporito casts some of his current objections as motions for "reconsideration" of our 1998 decision. Whatever authority we had to reconsider our own order was extinguished long ago by the Court of Appeals' conclusive disposition.

Accordingly, Saporito's petition for a new trial and motions for reconsideration are **DENIED** and this matter is **DISMISSED.**

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

ADMINISTRATIVE REVIEW BOARD
CERTIFICATE OF SERVICE

CASE NAME : ***Thomas Saporito v. Florida Power & Light Company***

ARB CASE NO. : **04-079**

ALJ CASE NOS.: **89-ERA-7 & 17**

DOCUMENT : **Final Decision and Order**

A copy of the above-referenced document was sent to the following persons on

DEC 17 2004

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Hon. John M. Vittone
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U.S. Department of Labor Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

THOMAS J. SAPORITO, JR., **ARB CASE NO. 98-008**

COMPLAINANT, **ALJ CASE NOS. 89-ERA-7**
89-ERA-17

v. **DATE: AUG 11, 1998**

FLORIDA POWER & LIGHT COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This case, arising under the employee protection provision of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § (1988),[1] was remanded to the Administrative Law Judge (ALJ) after the Secretary found that "[a]n employee who refuses to reveal his safety concerns to management and asserts his right to by pass the 'chain of command' to speak directly with the Nuclear Regulatory Commission is protected [from discrimination under the ERA." Secretary's Decision and Remand Order (Remand Order) at 1. The Secretary held that "[c]overed employers who discipline or discharge an employee for such conduct have violated the ERA." *Id.* Further, the Secretary found that Respondent Florida Power and Light

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[1] The amendments to the ERA contained in the National Energy Policy Act of 1992, Pub. L. No. 102-486 Stat. 2776 (Oct. 25, 1992), do not apply to this case in which the complaint was filed prior to the effective date of that Act.

Company (FP&L) violated the ERA when it discharged Complainant Thomas Saporito (Saporito) for three reasons, one of which was his protected refusal to reveal his safety concerns to FP&L managers and his insistence on speaking directly to the NRC. *Id.* at 6. The Secretary directed the ALJ to review the record and submit a new recommended decision on whether FP&L would have discharged Saporito for legitimate reasons even if he had not insisted on his right to reveal his safety concerns only to the NRC. *Id.*[2]

The case then was assigned to a new ALJ, who held another evidentiary hearing and found that FP&L proved that it would have taken the same action even if Saporito had not engaged in protected activity. Recommended Decision and Order on Remand (R. D. and O.) at 32. In a lengthy decision, the ALJ explicitly held that "either of the . . . two [unprotected] insubordinate acts itself would have justified. . . Saporito's termination." *Id.* at 33. For the Reasons discussed below, we agree with the ALJ, and dismiss the complaints.

BACKGROUND

I. Facts

Saporito worked for FP&L from 1982 to December 22, 1988, in various positions at several of its nuclear and non-nuclear power plants, transferring frequently from one plant to another and from job to job under the job bidding system of the collective bargaining agreement. *See* Respondent's Exhibit R-50, attachment 2. Saporito transferred to the Turkey Point nuclear plant from the St. Lucie, Florida, nuclear plant on April 23, 1988, as an Instrument and Controls (I&C) Specialist. *Id.*[3]

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[2] The Secretary also denied FP&L's motion for reconsideration of the Remand Order, noting that the decision did not preclude FP&L from proving on remand that it would have discharged Saporito for legitimate reasons even if he had not engaged in protected activity. Order, Feb. 16, 1995.

[3] Saporito bid on but was not awarded a transfer back to St. Lucie as an I&C Specialist in May 1988. The position was awarded in July 1988 to an employee with less seniority than Saporito, and Saporito

At Turkey Point Saporito filed numerous grievances over a variety of issues.[4] He also posed questions – internally to FP&L, to the Nuclear Regulatory Commission, and to an organization of nuclear power plant operators known as the Institute of Nuclear power Operations[5] -- about whether FP&L followed proper procedures. *See* T. (Transcript of original hearing) 745; 891; 895; Complainant's Exhibit (C) 24. Saporito also raised questions about the competency and mental stability of two supervisors after he had disagreements with them. T.787; 792; 802-803; 1147-50.

In November 1988 John Odom, the site Vice President at Turkey Point, decided to engage a private law firm to investigate Saporito's charges regarding the mental instability of the two supervisors, as well as Saporito's charges of harassment and intimidation. T. 1156-57; 1418-24. Saporito refused to cooperate with this investigation until all his outstanding grievances were resolved. T. 1172; 1428; RT. (Transcript of hearing on remand) 476. Odom decided to attempt to settle the grievances personally so that Saporito would talk to the outside investigators. T. 1433; 1435. Odom scheduled a meeting with Saporito for November 23, 1988, to review his grievances and try to settle them. T. 1437. Two days before the meeting, Odom learned that Saporito had nuclear safety concerns. T. 1438; RT. 486.

The November 23 meeting took almost all day. Some of Saporito's grievances were settled, but Odom could not settle Saporito's grievance over the failure to be awarded the job at the St. Lucie plant because Saporito demanded payment of $500,000 in damages. T. 1438E; 1438G. Toward the end of this meeting, Odom asked Saporito if he had any nuclear safety concerns. T. 1438G-1438H. Saporito answered in the affirmative, but said he would only reveal his safety concerns to the Nuclear Regulatory Commission.

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filed a grievance over this denial of job award. *See* R-50 and discussion in text below.

[4] By Saporito's own count, he had filed 35 to 40 grievances in approximately six months. T.1172.

[5] INPO was established by the nuclear power industry to police itself after the Three Mile Island accident. T. 1967.

After asking Saporito several times to tell him his safety concerns, Odom issued a direct order that Saporito tell his concerns to the NRC as soon as possible. T. 1438J. Saporito requested access to many of the Plant Work Orders (PWO) in order to prepare a report to the NRC about his safety concerns. T. 1438I.

Following the meeting, Maintenance Superintendent Joe Kappes reported to Odom that several union representatives had told him they were concerned that Saporito did not really have any safety concerns, but that he might try to create some. Odom therefore decided to restrict Saporito from access to vital areas of the plant. T. 1438M - 1438N; 2016-2017; RT 109.

Odom met with Saporito again on November 28 and 29 and settled all of his outstanding grievances. T. 1438T-1439. Saporito was to be transferred to the St. Lucie plant. However, the transfer was delayed two weeks in order to give Saporito time to speak with the outside investigators at Turkey Point. T. 1439; RT. 110. FP&L also agreed to pay Saporito $100 per day for each day he would have been working at St. Lucie if he initially had been awarded the St. Lucie job. T. 1440. In order to accomplish this settlement, Odom persuaded the Senior Vice President of Nuclear Operations to require St. Lucie to accept Saporito's transfer. T. 1441; RT. 111, 380.

On November 30 Odom learned that Saporito had begun to discuss his nuclear safety concerns with the outside investigators FP&L had hired. Therefore, Odom thought that Saporito would reveal his safety concerns to him. T. 1444; 1477; RT. 117-18; 619. Odom felt an obligation as site Vice President to learn what Saporito's safety issues were as soon as possible in order to take action on them if necessary. T. 1447; RT. 118. He also wanted to arrange Saporito's access to the PWOs so that Saporito could prepare his report to the NRC. T. 1443-44; RT. 112; 619. Finally, because Odom was unsure whether Saporito understood what a nuclear safety issue was, he wanted to discuss that issue with Saporito as well.

Therefore, Odom told Kappes to inform Saporito that Odom wanted to meet with him. T. 1448. Kappes asked Jerry Harley, the I&C Production Supervisor, to find Saporito and tell him about the

meeting. T. 1793; 2024. Harley found Saporito in the I&C shop around 5:00 PM and told him that Odom wanted to meet with him to discuss Saporito's safety concerns. Saporito at first replied that he did not have any safety concerns. T. 1794. Harley told Saporito to be prepared to holdover (stay at work beyond his regular quitting time) to attend the meeting with Odom. Saporito then said he would not holdover because he had to attend to personal family business. *Id.* Harley told Kappes that Saporito said he did not have any nuclear safety concerns and refused to holdover for the meeting . T. 1795; 2024.

When Kappes told Odom about Saporito's response, Odom said he still wanted to have the meeting. Kappes then went to the I&C shop and told Saporito to come tot the meeting with Odom. T. 2025. Saporito at first refused to come to the meeting, reiterating that he had personal family matters to address. T. 2026. When Kappes again ordered Saporito to holdover for the meeting, Saporito said he was sick and would not stay. T. 2027; RT. 119-120. After Saporito refused several times to holdover, Kappes told Harley that Saporito was suspended until further notice for defying an order, and that Harley was to take Saporito to the gate and take his badge. T. 2027-29. This incident occurred at about 5:15 or 5:20 PM on November 30. T. 2030.

When Kappes told Odom about this incident, Odom believed he had to support Kappes in his disciplining of Saporito for his act of "gross insubordination." RT. 121. However Odom also felt that it was necessary for Saporito to return to the plant so that he could continue talking with the outside investigators. T. 1453. Odom told Kappes to hold the suspension in abeyance and get Saporito back to the plant. T. 2034. Kappes called Saporito the next day; however, Saporito said he would be out sick until December 12 for medical disorders related to stress. T. 1254; 2035; RT. 124.

Odom decided to order Saporito to be examined by a company doctor because Odom wanted to learn whether Saporito's claim of being too ill to attend the November 30 meeting was legitimate and to determine if Saporito was physically fit to perform the duties of his job. T. 1454; 1456; RT. 124. When Saporito returned to work on December 12, he refused to see or be examined

by a company doctor. T. 2042. The next day, Saporito suggested to Kappes that the company doctor speak with his doctor as a way of resolving these issues. Kappes agreed on the condition that the company doctor found the communication with Saporito's physician sufficient to make a determination regarding Saporito's medical condition. T. 2048-49.

Kappes learned the next day that the company doctor, Dr. Richard Dolsey, had concluded that he still needed to examine Saporito to give his opinion whether Saporito had been too ill to attend the November 30 meeting with Odom and whether he was physically fit to perform the duties of his job. T. 2050. When Odom learned this, he decided it was still necessary to order Saporito to be examined by Dr. Dolsey. Saporito was directed to be examined by the doctor on December 16. Saporito said he would go to the doctor's office but would not permit the doctor to examine him. T. 2051. On December 16 Kappes and Odom received word that Saporito had gone to the doctor's doctor's office but had refused to be examined. T. 2053; RT. 127; *see also* T. 836; RT. 790.[6]

Odom concluded that Saporito's refusal to be examined by the company doctor was another act of insubordination and decided to discharge Saporito. T. 1482; RT. 127. The discharge notice gave three reasons for firing Saporito: 1) refusal on November 23, 1988, to comply with Odom's order to provide information about activities at the plant that could affect public health and safety, for which Saporito's access to vital areas and radiation controlled areas was restricted; 2) refusal to hold over for a meeting with Odom on November 30, 1988, for which Saporito was suspended indefinitely; and 3) refusal of an order on December 16, 1988, to be examined by the designated company doctor. R-104.

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[6] Dr. Dolsey wrote a detailed letter to FP&L explaining what happened when Saporito came to his office on December 16, which corroborates what Odom was told about the outcome of Saporito's visit to the doctor's office. Dr. Dolsey reported that Saporito "said very vehemently that he would not allow [Dr. Dolse]" to examine him. R-115. A union representative, who accompanied Saporito to the doctor's office and sat with him in the examining room, confirmed to Odom that Saporito refused to be examined. T. 1589.

II. ALJ Decision

The ALJ held, consistent with the Secretary's Remand Order, that the only issue to be decided on remand was whether FP&L proved that it would have taken the same action against Saporito even if he had not engaged in protected activities. He concluded that FP&L carried its burden of proof. R. D. and O. at 32. The ALJ found that "either of the latter two insubordinate acts [*i.e.*, refusal to attend the November 30 meeting with Odom and refusal to follow the order to be examined by the company doctor] by itself would have justified Saporito's termination," and that "the evidence overwhelmingly compels this result when the two instances of insubordination are considered as a whole." *Id.* at 33.

The ALJ found that Saporito's reasons for not attending the November 30 meeting were "dubious, if not outright unbelievable." R. D. and O. at 35. Saporito's "shifting excuses" for not attending the meeting showed that Saporito lied to Kappes. *Id.* at 37. The ALJ concluded that, even if the refusal to attend the meeting had some protected aspect because one purpose of the meeting was to learn Saporito's safety concerns, Saporito "exceeded the bounds of protected conduct [when he] *blatantly lied* as to his reason for not following that order." R. D. and O. at 37 (emphasis in original). He also found that Saporito was "insolent" and mocked management by the manner in which he stated his refusal to attend the meeting. *Id.* at 36.

With regard to Saporito's refusal to be examined, the ALJ found that FP&L clearly explained to Saporito several times the reasons for requiring him to be examined by Dr. Dolsey, that they were valid reasons, and that the order would have been given even if Saporito had not engaged in protected activity. R. D. and O. at 39-41. The ALJ also rejected Saporito's argument that FP&L "orchestrated" the sequence of events leading to the order that Saporito be examined as a means of "luring" him into insubordination for which he could be discharged. R. D. and O. at 42. He found that FP&L could not have known that Saporito would refuse to attend the meeting with Odom on November 30, that Saporito would give as a reason for not attending that he was sick, that he would be on sick

leave for almost two weeks, or that Saporito would refuse to be examined by Dr. Dolsey. *Id.*

The ALJ concluded that FP&L did not fail to follow its progressive discipline policy with Saporito because Saporito was warned about the consequences of failure to attend the meeting with Odom and was first suspended for his refusal. R. D. and O. at 44. The ALJ relied on evidence that other employees received substantial discipline, including discharge in two cases, for insubordination. The ALJ concluded that Saporito's "repeated insubordination," which went beyond the bounds of protected activity, was the cause of his termination, and that FP&L proved that these acts of insubordination "would have led to Saporito's termination even if he had not insisted on his right to speak directly with the NRC." R. D. and O. at 45.

DISCUSSION

I. Procedural Issues

A. Timeliness of Respondent's Reply Brief

Because Saporito's initial brief did not conform to the type size and style limitations of the briefing schedule, FP&L was given an opportunity to file a longer reply brief within 30 days of receipt of the order granting the right to file such a brief. Saporito argues that FP&L's reply brief was untimely filed because he received a copy of the Board's order on February 24 and FP&L's brief was filed with the Board on March 27, that is, 31 days later. However, FP&L stated in its response to Saporito's motion that it received the order granting leave to file a longer reply brief on February 25, and the return receipt for delivery of the order by certified mail shows a delivery date of February 25. FP&L's reply brief was timely filed.

B. Motion to Strike Part of FP&L's Reply Brief

Saporito also moved to strike a portion of FP&L's reply brief that asserted that FP&L was not allowed to introduce evidence about Saporito's employment history with FP&L before he arrived at the Turkey Point nuclear plant in April 1988. That portion of FP&L's

brief was simply a statement of its disagreement with the ALJ's ruling. Saporito's motion to strike is denied.

C. Motions for Remand and Reconsideration

Saporito moved to remand the entire case to give him an opportunity to amend his complaint to cover events that occurred at the St. Lucie nuclear power plant before he arrived at Turkey Point in April 1988. Those events occurred long before the ERA's then 30 days statute of limitations, and any action on them is now time barred. The motion to remand is denied.

Saporito also moved for reconsideration and remand of Case No. 89-ERA-07, which alleged that FP&L engaged in harassment of Saporito for his protected activity. That motion and accompanying memorandum only repeats arguments raised before the Secretary. In his June 3, 1994 Decision and Remand Order, the Secretary adopted the ALJ's conclusion that the alleged acts of retaliatory discipline and harassment "were not 'casually related to . . . [Saporito's] protected activity." Slip op. at 3. The motion for reconsideration and remand of Case No. 89-ERA-07 is denied.

D. Motion to File Second Rebuttal Brief

Saporito also moved for leave to file a second rebuttal brief to respond to new arguments raised in FP&L's second reply brief. That motion is granted.

II. The Merits

The Secretary held in his Remand Order that when FP&L discharged Saporito, it was motivated, at least in part, by an illegitimate reason: Saporito's refusal to reveal his safety concerns to Odom on November 23. R. O. at 6-7. The issue before us now is whether, under the dual motive analysis which is applicable under the circumstances of this case, FP&L has proven that it would have discharged Saporito even if, on November 23, he had not insisted on his right to reveal his safety concerns only to the NRC. *Pogue. V. U.S. Dep't of Labor*, 940 F.2d 1287, 1289-1290 (9th Cir. 1991) (Dual motive test set forth in *Mt. Healthy City School District v. Doyle,*

429 U.S. 274 (1977), applies where it was "undisputed" that complainant engaged in protected activity and "that this was a motive for disciplinary action"); *Passaic Valley Sewerage Commissioners v. United States Dep't of Labor*, 992 F.2d 474, 481 (3rd Cir.), *cert. denied*, 114 S.Ct. 439 (1993). We agree with the ALJ that FP&L has carried this burden. We turn to an examination of each incident to determine whether Saporito's conduct gave FP&L legitimate grounds for discharge.

A. Refusal to Holdover and Attend Meeting with Odom

Odom decided he wanted to meet with Saporito on November 30 for three reasons: to discuss the conditions under which Saporito would be provided the Plant Work orders he had requested; to determine whether Saporito actually understood what a nuclear safety concern was; and to ask Saporito what his concerns were because Odom had learned that Saporito had begun to reveal those concerns to the outside investigators and thought that Saporito might be ready to reveal them to Odom. T. 1444; RT. 117-18.

The information Odom received about Saporito's response was that Saporito, in front of other employees, had refused to meet with Odom after being given a direct order by both Harley and Kappes. T. 1794-95; RT. 120. Odom also learned that Saporito had given changing reasons for refusing to attend the meeting: first that he had no safety concerns; then that he had personal family matters to attend to; and finally that he was sick. In light of Saporito's shifting justifications for his refusal to holdover to attend the meeting with Odom, Saporito's refusal appeared to Odom to be a clear act of insubordination. T. 1451. We agree with the ALJ that FP&L could have discharged Saporito for that reason alone.

In this regard we find it significant that FP&L did not immediately discharge Saporito after the November 30 incident, but instead suspended him. Indeed, FP&L proved that Saporito's suspension was consistent with discipline (including discharge, suspension, and demotion) it had meted out to other employees under similar circumstances. *See* R-111.

We also reject Saporito's argument that by refusing to attend the meeting with Odom, Saporito was insisting on his right to reveal his safety concerns only to the NRC. First, Saporito never stated as a reason for not attending the meeting with Odom that he did not want to be interrogated about his safety concerns.

Second, the mere fact that one of Odom's objectives in meeting with Saporito was to ask again about Saporito's safety concerns did not insulate Saporito from all directives given by his employer. "Even when an employee has engaged in protected activities, employers legitimately may discharge for insubordinate behavior, work refusal, and disruption." *Abu-Hjeli v. Potomac Electric Power Co.*, Case No.89-WPC-1, Sec'y Dec., Sept. 24, 1993, slip op. at 17, citing *Duram v. Brock*, 794 F.2d 1037, 1041 (5th Cir. 1986). This is not a situation in which an emloyee's alleged insubordination was "the result and manifestation of his proteced activity." *Dodd v. Polysar Latex*, Case No. 88-SWD-0004, Sec'y. Dec., Sept. 22, 1994, slip op. at 15-16. Saporito had a duty to comply with the order to meet with Odom. If Odom again had asked about Saporito's safety concerns, Saporito then might have been justified in refusing to reveal those concerns;[7] however, because of Saporito's refusal to meet with Odom, this scenario is not before us.

A situation similar to this case arose in *Yule v. Burns Int.'l. Security Service*, Case No. 93-ERA-12, Sec'y. Dec., May 24, 1995, where an employee who had engaged in protected conduct refused to follow an order to sign a training document indicating she had

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[7] In his Remand Order, the Secretary held that Saporito's attempt to by-pass the employer's "chain of command" in favor of speaking directly with the Nuclear Regulatory Commission was protected by the ERA. Remand Order at 1. *See also*, Sec. Order, Feb. 16, 1995. However, we note that by the time Saporito refused to meet with Odom on November 30, 1988, he had already begun meeting with FP&L's outside investigator with regard to his safety concerns. The Secretary did not reach the issue whether an employee, having initiated discussions with the company or the company's agents with regard to environmental or nuclear safety concerns, may then abruptly refuse to cooperate in reporting safety concerns absent unusual intervening circumstances.

received it and understood its contents. The Secretary held that the respondent proved it would have discharged the complainant for this insubordination even if she had not engaged in protected activities. *Yule*, slip op. at 13-14. the Secretary in *Yule* found that the employee did not make a statement that signing the training document was a "cover-up to the NRC," and that his analysis would have been very different if the employee had made such a statement. *Yule*, slip op. at 10 and n.8. Similarly, our analysis in this case would also have been different if Saporito had gone to the meeting with Odom but refused to reveal his safety concerns when asked. However, in the circumstances of this case, the ERA does not protect him from disciplinary action for refusing to attend the meeting at all.

Saporito also argues that the reason he did not want to meet Odom on November 30 was that he did not want to be questioned about his safety concerns, and that he feared retaliation and harassment. But Saporito himself testified that the reasons he gave Kappes for not attending the meeting were that he had family business to attend to and that he was sick, not that he did not want to be questioned about his safety complaints. T. 919-20.

Finally, Saporito cites National Labor Relations Act cases to support his argument that Odom's request that Saporito meet with him violated the ERA because that order tended to coerce Saporito into refraining from exercising his rights under the Act. The courts have applied a multi-factor test to determine whether employer interrogation about protected activities tends to be coercive. One of the factors to be considered is whether the employer had a valid purpose in questioning the employee. *NLRB v. McCullough Environmental Services, Inc.*, 5 F.3d 923, 928 (5th cir. 1993). In *NLRB v. Brookwood Furniture Div. of U.S. Indus.* 701 F.2d 452, 460-462 (5th Cir. 1983), the court held that questioning of employees about union activities is not illegal *per se*, and noted that in none of the alleged instances of coercive interrogation did the employer have a valid purpose for questioning employees about their support for a union. Here, Odom clearly had a valid purpose in wanting to question Saporito about his safety concerns: to learn whether any of those concerns had immediate significance for public health and safety. Moreover, Odom had other valid reasons to need to speak with Saporito, most important his need to set up a procedure for

Saporito to have access to the PWOs. We hold that Odom's attempt on November 30 to question Saporito about his safety concerns and to meet with him about making the PWOs available did not have the effect of coercing Saporito into refraining from exercising his right under the ERA to contact NRC about his safety concerns.

In light of Saporito's shifting explanations for his refusal to meet with Odom, and his failure to invoke any legitimate ERA-related reason for declining to meet. FP&L has established that Odom was justified in taking disciplinary action against Saporito for his refusal to meet with Odom.

B. Refusal to be Examined by Designated Doctor

Saporito gave different reasons for refusing to meet with Odom on November 30, saying first that he had to attend to family matters and then stating he was sick and could not stay for the meeting. This inconsistency raised questions in Odom's mind about whether Saporito was in fact too ill to meet with him; it impressed Odom as a "fabrication." RT. 788. Saporito then told Kappes the next day that he would be on sick leave until December 12 for medical disorders related to stress. Odom reasonably became concerned about Saporito's physical ability to perform his job and decided Saporito should be examined by the designated company doctor.

Later Odom was informed, both by the Human Resources Department and by a union steward who accompanied Saporito to the doctors office, that Saporito had refused to be examined by the doctor.[8] RT. 790-91. This appeared to Odom as another act of insubordination by Saporito, which, taken together with the refusal

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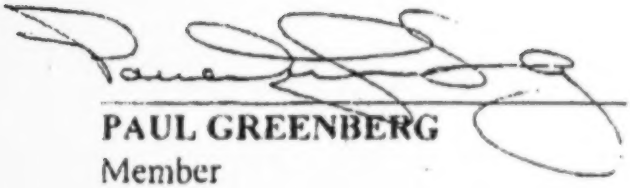
[8] Saporito argues that he never explicitly refused to be examined. The record shows that Saporito did not *say* explicitly that he refused to be examined, but his *actions* in repeatedly asking the doctor questions had the same effect. The doctor told the FP&L representative who accompanied Saporito to the doctor's office that Saporito had refused to be examined and testified to that effect at the first hearing. T. 628-630. Under the circumstances, FP&L was justified in concluding that Saporito had refused the examination.

to meet with him on November 30, appeared to Odom to be gross insubordination. Odom believed that Saporito's behavior of picking and choosing which orders would be obeyed could not be tolerated. T. 1483; RT. 797. Although Odom was aware that firing Saporito might look bad under the circumstances, he felt that the potentially negative impact of the discharge was outweighed by the gravity of Saporito's insubordination, which was common knowledge at the plant and which would set a bad precedent if not addressed by management. RT. 769; 797.

This case is distinguishable from *Diaz-Robainas v. Florida Power & Light Co.*, Case No. 92-ERA-10, Sec'y. Dec., Jan. 19, 1996, in which an employee was fired for refusing to undergo a psychological fitness for duty examination. The Secretary held there that the order to submit to the examination was a pretext to discourage the employee from engaging in protected activity. *Diaz-Robainas*, slip op. at 19. Because the order to undergo the examination was illegal, the Secretary held that FP&L violated the ERA when it fired the employee for refusing to submit to the examination. *Diaz-Robaines*, slip op. at 20. In this case, I contrast, FP&L had legitimate grounds to require Saporito to submit to a medical examination: that he had refused to attend a meeting with Odom because he claimed to be sick and then took extended sick leave for medical disorders which he asserted were related to stress.

We join the ALJ in finding that FP&L has proven by a preponderance of the evidence that it would have discharged Saporito for his insubordination in refusing to attend a meeting with Site Vice President Odom and refusing to comply with the order to be examined by the designated company doctor, even if he had not engaged in protected activity on November 23. Accordingly, the complaint in this case is **DISMISSED.**

SO ORDERED.



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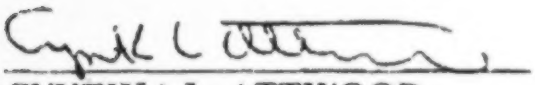

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Acting Member

ADMINISTRATIVE REVIEW BOARD
CERTIFICATE OF SERVICE

CASE NAME : ***Thomas J. Saporito, Jr., v. Florida Power & Light Company***

ARB CASE NO. : **98-008**

ALJ CASE NOS.: **89-ERA-7, 89-ERA-17**

DOCUMENT : **Final Decision and Order**

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(3)

No. 05-717

In The

SUPREME COURT of the UNITED STATES

THOMAS SAPORITO,

Petitioner,

v.

U.S. DEPARTMENT OF LABOR, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

(1) WHETHER THE ELEVENTH CIRCUIT COUT OF APPEALS CORRECTLY HELD THAT RES JUDICATA BARRED ANY FURTHER REVIEW OF THE MERITS OF THIS CASE WHERE:

(A) FINAL JUDGMENT WAS ENTERED BY THE ELEVENTH CIRCUIT SIX YEARS PRIOR TO THE FILING OF THE INSTANT PETITION FOR A WRIT OF CERTIORARI BASED UPON THE SAME FACTS AND CLAIMS AND WHERE PETITIONER HAD A FULL AND FAIR OPPORTUNITY TO LITIGATE ALL HIS CLAIMS;

(B) NO NEW AND SUBSTANTIALLY DIFFERENT EVIDENCE HAS EMERGED IN THE INTERIM;

(C) THERE HAS BEEN NO CONTRARY CONTROLLING AUTHORITY ISSUED IN THE INTERIM; AND

(D) THE EARLIER RULING WAS NOT CLEARLY ERRONEOUS AND HAS NOT WORKED ANY MANIFEST INJUSTICE IN THIS CASE.

(2) WHETHER THIS COURT HAS JURISDICTION TO REVIEW A FINAL ORDER OF THE ELEVENTH CIRCUIT COURT OF APPEALS ENTERED OVER SIX YEARS PRIOR TO THE INSTANT PETITION FOR A WRIT OF CERTIORARI.

CORPORATE DISCLOSURE STATEMENT

1. FPL Group, Inc. 700 Universe Boulevard, Juno Beach, FL 33408

2. Florida Power and Light Company, a wholly owned subsidiary of FPL Group, Inc., 700 Universe Boulevard, Juno Beach, FL 33408

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RESTATEMENT OF THE CASE

A summary of the material facts and procedural history in this case is set forth below.

A. Summary Of Pertinent Record Facts.

Petitioner, Thomas Saporito ("Saporito"), worked for Florida Power & Light Company ("FPL") from 1982 until December 22, 1988, in various positions at several of FPL's nuclear and non-nuclear power plants. Saporito's last position worked was as an Instrument and Controls Specialist at FPL's Turkey Point nuclear plant in south Florida.

In November 1988, FPL's Site Vice President at Turkey Point (John Odom) directed, on more than one occasion, that Saporito appear for a meeting with Mr. Odom to discuss alleged nuclear safety concerns held by Saporito. Saporito refused to attend the meeting and was subsequently suspended for gross insubordination. Mr. Odom held the suspension in abeyance until an investigation into the alleged safety concerns could be completed.

When informed that he must report back to work, Saporito informed FPL that he would be out sick for two weeks for medical disorders related to stress. Upon Saporito's return to work after the two-week period, Mr. Odom ordered a fitness-for-duty exam of Saporito pursuant to FPL policy. Saporito refused to be examined. As a result, Mr. Odom terminated Saporito's employment with FPL for continued gross insubordination.

B. Summary Of Procedural History.

This proceeding arises under Section 210 (now 211) of the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. § 5851, and stems from complaints filed by Saporito with the United States Department of Labor ("DOL") in 1989. In his DOL complaints, Saporito alleged that he was subjected to harassment and discriminatory treatment (Case No. 89-ERA-7) and later

discharged (Case No. 89-ERA-17) because he engaged in certain activities protected by the ERA.

The two cases were consolidated for the initial hearing, which was held in February 1989. Following that hearing, Administrative Law Judge Anthony J. Iacobo issued a Recommended Decision and Order denying Saporito's complaints (dated June 30, 1989).

Five years later, the Secretary of Labor issued a Decision and Remand Order (dated June 3, 1994). In that Decision, the Secretary found in favor of FPL and held that he agreed with Judge Iacobo's Recommended Decision that the allegations of harassment and retaliatory discipline encompassed in Case No. 89-ERA-7 were not causally related to any protected activity in which Saporito may have engaged. In the Decision and Remand Order, however, the Secretary of Labor disagreed with Judge Iacobo's Recommended Decision with respect to Case No. 89-ERA-17, and remanded the case to Judge Iacobo for a "dual motive" determination of "whether FPL would have discharged Saporito for the unprotected aspects of his conduct" which related to his protected activity.

On February 16, 1995, the Secretary of Labor issued an Order indicating that his June 3, 1994 Decision and Remand Order should not be interpreted as giving an employee an absolute right to refuse to report safety concerns to plant management. Instead, the Secretary stated that an employee's right to bring concerns to the Nuclear Regulatory Commission ("NRC") is separate from his duty to reveal his safety concerns to management. In other words, the Secretary stated that an employer may discipline an employee for refusing to reveal his safety concerns to management, even though it may not discipline an employee for taking information directly to the NRC.

The hearing on remand was held in January 1997. Because Judge Iacobo had retired, the case was reassigned to Administrative Law Judge David W. DiNardi.

Following that hearing, Judge DiNardi issued a Recommended Decision and Order on Remand (dated October 5, 1997). On August 11, 1998, the Administrative Review Board (the "Board") issued a Final Decision and Order in which it agreed with the DiNardi decision and dismissed the Complaint, finding that FPL would have discharged Saporito for his insubordination, even if he had not engaged in protected activity. See Thomas J. Saporito v. Florida Power & Light Co., ARB Case No. 98-008, 1998 WL 470668 (Aug. 11, 1998) ("ARB-1998"). Saporito appealed the Board's decision in that case to the Eleventh Circuit Court of Appeals in 1999. The Eleventh Circuit affirmed the Board's decision, and subsequently denied Saporito's motion for rehearing en banc. See Saporito v. U.S. Dep't of Labor, 192 F.3d 130 (1999) (per curiam), reh'g en banc denied, 210 F.3d 395 (11th Cir. 2000) (unpublished table decision). The Eleventh Circuit found that "[Saporito's] complaints in this case presented fact-intensive issues and substantial evidence in the record supports the findings that resulted in the dismissal of these complaints. We also find that Saporito has failed to demonstrate that proper legal standards were not applied." Id. Saporito subsequently attempted to file a petition with this Court, but did not comply with filing deadlines.

On January 25, 2004, more than five years after the Board's final decision in ARB-1998 and four years after the Eleventh Circuit's affirmance of that decision, Saporito filed with the Board a Motion for Reconsideration of the Board's decision in ARB-1998. Then, on May 12, 2004, Saporito filed with the Board a Motion for New Trial pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. On or about June 7, 2004, Saporito filed a Supplemental Motion for Reconsideration. The Board denied Saporito's motions and dismissed the case, finding that the Eleventh Circuit's adjudication was final on the merits and, therefore, any further proceedings were barred by the doctrine of *res judicata*. See Thomas J. Saporito v. Florida Power & Light Co., ARB Case No. 04-079, 2004 WL 3038071 (Dec. 17, 2004)("ARB-2004"). Specifically, in its decision in ARB-2004, the Board denied Saporito's motions for reconsideration and new trial, reasoning that:

> The Eleventh Circuit decision is the final adjudication on the merits of Saporito's 1989 complaint. That decision stands as a complete bar to further review of the merits of Saporito's complaint. "[T]he doctrine of *res judicata* provides that when a final judgment has been entered on the merits of a case, '[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.'" *Nevada v. United States*, 463 U.S. 110, 129-130, 103 S. Ct. 2906, 2918 (1983) (internal citation omitted).

2004 WL 3038071 at *1.

On or about February 9, 2005, Saporito petitioned the Eleventh Circuit for review of the Board's decisions in ARB-2004; ARB 98-008, Case No. 89-ERA-7 and Case No. 89-ERA-17. On March 4, 2005, FPL moved to intervene in the pending appeal. The Eleventh Circuit granted FPL's motion on March 29, 2005. FPL then filed a Motion to Dismiss the appeal on the basis of *res judicata*. By order dated June 2, 2005, the Eleventh Circuit granted FPL's Motion to Dismiss. Saporito moved for reconsideration of the dismissal, which the Eleventh Circuit denied on July 21, 2005. Saporito filed the instant Petition for Writ of Certiorari on or about October 17, 2005, and a Supplemental Appendix on or about November 6, 2005 (on November 30, 2005, he filed a second copy of the same Supplemental Appendix).

REASONS FOR DENYING THE WRIT

A. The Petition For Writ Of Certiorari Should Be Denied Because It Fails To Set Forth Any Basis For Certiorari Review.

Pursuant to U.S. Supreme Court Rule 10, this Court has discretion to grant a petition for writ of certiorari where compelling circumstances exist, such as where the appellate court's decision is in direct conflict with an appellate court in another circuit or with a prior decision of the Supreme Court, or where the appellate court "has decided an important question of federal law that has not been, but should be, settled by this Court." Rule 10 clearly states that a "petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." See also Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U.S. 508 (1924).

In this case, Saporito does not argue that the Eleventh Circuit's opinion is in direct conflict with the decision of another Circuit Court of Appeal or with relevant decisions from this Court. Nor does he argue that this case involves an important question of federal law. Rather, Saporito merely asserts, in essence, that the Eleventh Circuit erred by: (1) not applying a *de novo* standard of review; (2) not revisiting it's order from six years past; (3) applying the doctrine of *res judicata* to bar further review of the merits; and (4) finding that the Board's decision was supported by substantial evidence. Saporito then spends 14 pages of his Petition rehashing the facts presented in the forums below and explaining how those facts should be interpreted in his favor. Clearly, Saporito is improperly arguing the merits of his claim rather than providing this Court with a basis to grant certiorari review. Accordingly, his Petition should be denied.

B. The Petition For Writ Of Certiorari Should Be Denied Because The Petition Is Untimely As To The Board's And The Eleventh Circuit's Prior Orders.

In his Petition, Saporito uses the Eleventh Circuit's June 2, 2005 dismissal based on *res judicata* grounds to resurrect his now time-barred claim that this Court should grant certiorari review of the Eleventh Circuit's August 3, 1999 order upholding the Board's August 11, 1998 Final Decision and Order. Rule 13.1 of the Supreme Court Rules clearly mandates that a petition for writ of certiorari to review a judgment entered by a U.S. Court of Appeals in a civil case must be filed "within 90 days after entry of the judgment." Here, Saporito is attempting to have certiorari review granted over an appellate judgment entered six years ago. That judgment became final 90 days after its entry date of August 3, 1999, when Saporito failed to timely move this Court for certiorari review. Thus, the instant Petition must be denied. See, e.g., New Haven Inclusion Cases, 399 U.S. 392, 481 (1970) (holding that a party who "took no appeal" from an adverse order is "foreclosed by *res judicata*" from later seeking relief inconsistent with that order).

C. Principles Of Equity And Justice Dictate That The Petition For Writ Of Certiorari Be Denied In Order To Bring Finality To This Litigation.

In this case, Saporito is seeking certiorari review of the Eleventh Circuit's order declining to revisit, on *res judicata* grounds, its own order of six years prior. Specifically, Saporito believes the Eleventh Circuit erred by not allowing him to re-litigate the same claims stemming from complaints he originally filed in 1989, which were brought to final judgment six years ago when Saporito failed to timely seek certiorari review before this Court.

"Under the law-of-the-case doctrine, [the resolution of] an issue decided at one stage of a case is binding at later stages of the same case." Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1289,

1290 (11th Cir. 2005) (internal quotation marks omitted). In Schiavo, the Eleventh Circuit went on to state that "[t]he doctrine operates to preclude courts from revisiting issues that were decided explicitly or by necessary implication in a prior appeal." Id. "The doctrine is based on the premise that an appellate decision is binding in all subsequent proceedings in the same case." Litman v. Mass. Mut. Life Ins. Co., 825 F2d 1506, 1510 (11th Cir. 1987), cert. denied, 484 U.S. 1006 (1988). The law of the case doctrine therefore serves the "interest[] of judicial efficiency." Conway v. Chemical Leaman Tank Lines, Inc., 644 F.2d 1059, 1061 (5th Cir. 1981).

The limited exceptions to this doctrine which, when present, do not limit a tribunal's power to revisit a previously decided issue, are applicable when: "(1) new and substantially different evidence emerges at a subsequent trial; (2) controlling authority has been rendered that is contrary to the previous decision; or (3) the earlier ruling was clearly erroneous and would work a manifest injustice if implemented." Schiavo, 403 F.3d at 1292 (internal quotation marks omitted).

In this case, Saporito failed to establish any of the foregoing exceptions. He has presented no new evidence, no contrary controlling authority, and no manifest injustice. Further, the fact that Saporito did not timely seek certiorari review of the prior order should, in and of itself, render that order a final judgment for *res judicata* purposes, thereby barring further review by the Eleventh Circuit. See, e.g., New Haven Inclusion Cases, 399 U.S. at 481.

Clearly, Saporito's latest round of proceedings before the Board and Eleventh Circuit (and now, this Court) are nothing more than a ruse to resurrect foreclosed claims. Indeed, the arguments raised by Saporito before these forums are disingenuous (and border on the vexatious) in that he has raised nothing new – all of the claims contained in his most-recent motions before the Board, in his Eleventh Circuit appeal, and in the instant Petition are the same ones he has already made and litigated, and which have been fully and fairly adjudicated, over six years ago.

"Where, as here, the litigation has already been in the federal courts an inordinately long time, considerations of equity require that the litigation be brought to an end as quickly as possible." Pub. Utils. Comm'n v. United Fuel Gas Co., 317 U.S. 456, 463 (1943). For Saporito, that end is here and now. Cf. Jefferson v. City of Tarrant, 522 U.S. 75, 85 n.1 (1997) (noting that "[t]he goals of finality would be frustrated, rather than furthered, by these wasteful and time-consuming procedures. Based on the unusual facts of this case, the justifications for the finality doctrine - efficiency, judicial restraint, and federalism - would be ill served by another round of litigation on an issue that has been authoritatively decided by the [court below].") (internal citations omitted). This Court should thus "exercis[e] its inherent power with a sharp eye to the 'principle that litigation must at some definite point be brought to an end,'" and deny the instant petition for certiorari review of this matter. U.S. v. The Ohio Power Co., 353 U.S. 98, 109 (1957) (internal citation omitted).

CONCLUSION

Based upon the foregoing arguments and authorities, FPL respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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